IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-826

ELLSWORTH H. MOSHER,
Petitioner

v.

HON. HOWARD T. MARKEY
HON. GILES S. RICH
HON. PHILLIP B. BALDWIN
HON. DONALD E. LANE
HON. JACK R. MILLER
The Chief Judge and the Associate Judges of the United States Court of Customs and Patent Appeals

and

CHIRANJIB K. SARKAR,
Respondents

RULE 24(5) SUPPLEMENT TO "PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS"

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December, 1978

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Since this petition was filed, the C.C.P.A. has handed down its decision *on the merits* in *Sarkar* (slipsheet opinion dated December 7, 1978). The court affirmed the Patent Office rejection of all of Sarkar's claims.

Although Sarkar has 21 days within which to petition for rehearing (C.C.P.A. Rule 6.1) and 90 days within which to petition for certiorari to this Court, it is anticipated that Sarkar in the case at bar probably will urge dismissal of this petition because of alleged mootness.

The decision adverse to Sarkar on the merits does not moot the important public interest question presented by this petition. It is well settled that where a substantial question involving the public interest is likely to be a *recurring* one, the fact that in the particular case under consideration events may have rendered moot any possible relief as to the particular parties is not sufficient to deprive the Court of jurisdiction because of alleged mootness. For example, see *Moore v. Ogilvie*, 394 U.S. 814 (1969) at 816, and *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974) at 125-6.

Rule 5.13(g) still remains on the books. It seems quite clear from the following excerpt from the lower court's opinion at App. 6-a:

> "We do not share the view that Rule 5.13(g) opens a Pandora's box, or that virtually each and every appellant will move the court to take those actions if the present petition is not granted. To take counsel of those fears would require a jaundiced, and unwarranted, view that frivolous motions for *in camera* proceedings would proliferate. It would further pre-suppose an inability of this court to summarily reject those expectedly rare requests. That a rule of court, like Rule 5.13(g), may be subject to abuse does not justify abandonment of the rule."

that the court will continue to entertain motions for a closure order in direct appeals from the Patent Office. This therefore is the "continuing and brooding presence"

so aptly characterized by this Court in *Super Tire* (416 U.S. at 122).

As stated later in *Super Tire*,

> "It is sufficient, therefore, that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." (416 U.S. at 125-6)

and

> "The important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." (416 U.S. at 126)

By tests such as these, petitioner is entitled to have this Court pass upon the important public question presented by the petition herein, despite the lower court's intervening ruling on the merits in Sarkar's appeal. The danger to which the petition is addressed still persists, and this Court should grant certiorari in order to resolve it.

Respectfully submitted,

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